CITY OF LODI

COUNCIL COMMUNICATION

AGENDA TITLE: Appeal of Fees for Development of 2024 Edgewood Drive (Kampe)

MEETING DATE: November 16, 1994

PREPARED BY: City Attorney

RECOMMENDED ACTION: Council consideration and final action on the appeal of Betty and Gilbert Kampe.

BACKGROUND INFORMATION: At the last City Council meeting, final action on this matter was delayed until the City Attorney's office could research a number of legal issues raised during the hearing. Several factual determinations, including the date of the original development, previous fees paid etc., were also presented. Attached is the legal opinion requested by the City Council. An attempt was made to address the questions in the order presented during the hearings.

Irrespective of the final decision of the Council on this matter, it will be necessary to adopt written findings in case the applicant desires to have the Council's decision reviewed by a court. Those findings would probably involve one of two options:

First, the City Council can find that the appeal for fee adjustment, waiver or exemption is sustained based on an absence of a reasonable relationship between the impact on public facilities of the development and either the amount of the fee charged or the type of facilities to be financed. As explained in the attached opinion, it would be inappropriate for me to substitute my opinion for the City Council's; however, in reviewing the record, I cannot point to evidence which to me justifies the findings necessary to support a waiver or exception.

Second, the Council can find that the applicant has failed to sustain the burden of proof required by §15.64.120 and that no evidence was shown establishing an absence of such reasonable relationship between the impact on public facilities of the development and the amount of fee charged or type of facilities financed.

APPROVED _____

THOMAS A. PETERSON
City Manager

CC :

Admittedly, the Council may view the testimony heard last week in a light different than mine. The Council has that right, but is required to identify specific facts upon which any determination is based.

As a reminder, the public hearing was closed at the prior Council meeting and it is not required that further testimony or public input be allowed.

FUNDING: None.

Respectfully submitted,

Bob McNatt
City Attorney

BM:pn

KAMPE.APL/TXTA.01V

CITY OF LODI

MEMORANDUM FROM THE OFFICE OF THE CITY ATTORNEY

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To: Honorable Mayor & City Councilmembers

From: Bob W. McNatt, City Attorney

Date: November 10, 1994

Subject: Appeal of Betty and Gilbert Kampe Regarding Miscellaneous Development Fees (2024 Edgewood Drive)

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At the November 2, 1994 City Council meeting, several questions were presented in connection with the appeal of Mr. & Mrs. Kampe regarding various fees and charges for construction of a single-family home at 2024 Edgewood Drive. Research has now been completed and the following responses prepared on the topics described below:

1. WAIVER PROVISIONS AND FEES SCHEDULES APPLICABLE

The nature and amount of the fees payable on projects in Lodi is determined in large part by the date upon which certain events happen. Fee structures have changed over the years and the Council has in the past attempted to be fair in assessing fees on projects in progress when the changes occurred. The subdivision in which this lot is located (Lakewood Subdivision, Unit No. 4) was approved June 7, 1967 . At that time, no storm drain impact fees or other impact fees were in place, so no impact fees of any nature have apparently ever been paid on this lot.

On April 5, 1972, Resolution 3618 was adopted by the City Council, establishing a "Master Drainage Fee" program. Paragraph 6 of this Resolution provides:

> That this fee shall apply to all properties developed after March 15, 1972 except tentative maps or use permits developed by the Planning Commission prior to that date and developed within eighteen months of the approval date of the Planning Commission.

Obviously, this lot did not develop within the eighteen month exemption "window" specified, and so became subject to the fees otherwise imposed by Resolution 3618.

Resolution 3618, imposing storm drainage fees was superseded by Ordinance 1440, adopted November 16, 1988. The fee applied "...upon issuance of all building, use or occupancy permits...for any development approval issued after thirty days following this ordinance's passage." No exemption provisions were included in Ordinance 1440.

In 1991, Ordinance 1518 was adopted for the purpose of pulling together and clarifying development impact fees. To a degree, Ordinance 1518 superseded the provisions of both Resolution 3618 and Ordinance 1440. A portion of Ordinance 1518 (codified as Municipal Code §15.64.110)

explained the circumstances under which fee exemptions would be granted. These circumstances allowed exemptions (among other things) where "a project...has, on the effective date of this ordinance [1991]...received the appropriate development approval, but has not obtained a building permit and (emphasis added) has paid appropriate mitigation fees under Resolution 3618 or Ordinance 1440..." The parcel involved here does not meet that two-part test. While it has "appropriate development approval" (a subdivision map) no fees were apparently ever paid under either Resolution 3618 or Ordinance 1440, and so it does not appear to meet the conditions for exemption.

In addition to the exemption provisions discussed above, LMC §15.64.120 provides for "adjustment or waiver" of fees. The only grounds described for justification of such waiver or adjustment are "...the absence of any reasonable relationship between the impact on public facilities of that development and either the amount of the fee charged or the type of facilities to be financed" [LMC §15.64.120 (A)].

To support an adjustment or waiver, it is necessary that the Council make written findings of fact describing the justification for its action [LMC §15.64.130 (D)] and the party seeking adjustment has the burden of proof [LMC §15.64.120 (E)].

To my recollection, no substantial testimony was presented at the public hearing addressing the absence of a reasonable relationship between the development's impact on public facilities and the amount or type of fees charged. I believe the applicant's sole grounds were that she felt she had been misinformed about the total amount of fees payable. Although it would be inappropriate for me to usurp the City Council's fact finding authority, I cannot point to any evidence in the record which appears to justify the findings necessary to support a waiver or exception.

2. OTHER BASES FOR WAIVER OR EXEMPTION

As discussed above, no grounds appear to me which satisfy the exemption or waiver provisions of Chapter 15.64. However, the lot owner has suggested that waiver or adjustment is appropriate on the non-statutory basis that City staff failed to inform her of the actual amount of total fees due until after she bought the lot. Mrs. Kampe has stated that she would not have gone through with the purchase had she known that amount in advance. In legal terms, this is usually referred to as "estoppel". This simply means that someone with negligently or intentionally gives erroneous information to a second party, knowing the second party will take some action based on that information and will be damaged thereby, cannot later "change positions" and deny the accuracy of the information. While this rule of law is occasionally applied to public agencies (County of Los Angeles v. Alhambra 165 Cal. Rptr. 440; Long Beach v. Mansell 91 Cal. Rptr. 23) the facts necessary to prove estoppel do not seem to exist here.

A similar case is Winnaman v. Cambria Community Services District (1989) 256 Cal. Rptr. 40. In that case, the landowner/developer in 1984 got a confirmation letter from the district that water and sewer

services were available. He paid $3,840 in fees under the existing ordinance although he did not apply at that time for a building permit. A new ordinance was thereafter adopted raising fees to over $24,000 for his project and further providing that it applied to all projects which had not yet received a building permit. The owner was billed for the higher fee when he later applied for a building permit. He then sued based on (among other things) estoppel.

The district's action was upheld by an appellate court which noted that the party claiming estoppel must have relied on the opposing parties representations, and the "existence of the [fee] ordinance requiring parties who had not obtained building permits by April 19, 1985 to pay higher fees precluded such reliance..." (Winnaman supra at 44). The Court went on to say that the owner/developer must be presumed to know the new fee ordinance even though he could prove that he had no actual knowledge of it (Winnaman supra at 144, citing McCarthy v. California Tahoe Regional Planning Agency 180 Cal. Rptr. 866).

It is also noted in passing that California Government Code §818.8 makes a public agency immune from liability for an alleged misrepresentation by an employee, whether that misrepresentation was intentional or negligent. This includes misrepresentations which harm commercial or financial interests (Lundeen Coatings Corporation v. Dept. of Water and Power of Los Angeles 283 Cal. Rptr. 551; Grenell v. City of Hirmosa Beach 163 Cal. Rptr. 315). While this law may appear harsh to some, the State Legislature has found it necessary and appropriate to establish this as public policy in California.

Although Mrs. Kampe may have received information which was inaccurate or incomplete from a City staff member, in my opinion this does not provide a legal basis upon which to hold the City liable for forgiving any fees or charges in excess of those quoted. Obviously, even if Mrs. Kampe had been given an accurate figure and the City Council thereafter raised fees before the building permit was issued, no liability would result because there can be no guarantees that fees will not change before final approval before any project is obtained. While it would be unfortunate if Mrs. Kampe was given inaccurate information, it is not a legally supportable basis for forgiving the fees in my opinion.

3. WAIVER OF PROCEDURAL RIGHTS BY THE APPLICANT

Under Municipal Code §15.64.120, a procedure is provided for handling fee appeals. It requires (among other things) that the Public Works Director within sixty days after receiving a written application for a fee waiver or adjustment hold an "informal hearing". Thereafter, if the applicant is dissatisfied with the Public Works Director's decision, the matter goes on to the City Council.

In the present case, Mrs. Kampe's letter of September 19, 1994 was treated by staff as an application for exemption, waiver or adjustment even though it was not formally labeled as such. Likewise, no formal "hearing" was held by Public Works who instead relied solely on the documents provided and the verbal input.

It would appear that requiring rigid adherence to the provisions of the Municipal Code on this point would only harm the applicant, since it would mean going back several steps in the process only to eventually get back to where we already are. Mrs. Kampe has waived these procedural rights, which is valid on its face since the owner or holder of a right, even one granted by statute, can waive it if desired (People v. Murphy 24 Cal. Rptr. 803). The procedural rights contained in this ordinance are there solely for the protection of the applicant. Waiving them allows her to proceed in a quicker fashion to get a final decision from the City Council.

4. BASES FOR VALIDITY OF FEE SCHEDULE

The validity of the fee schedule was questioned indirectly during the hearing but deserves to be addressed in passing. As discussed by the Court in the Winnaman case above, rates for such services as sewer and water are presumed to be reasonable and fair and the burden of overcoming this presumption is on the party challenging them (Winnaman at 42). It is not required that the City show on the ordinance's face that the charges were based on the nature of the use and the benefits extended [Winnaman supra at 42 citing Cal. Gov. Code §54991 (a)].

In Lodi's case, the basis for the fees established is described in Municipal Code §15.64.010 (E) which states in relevant part:

> The specific improvements to be financed by the fee are described in the City of Lodi Development Impact Fee Study prepared for the City by Nolte & Associates and Angus McDonald & Associates, dated August 19, 1991 a copy of which is on file with the City Clerk. The calculation of the fee is based upon the findings in the referenced study.

I am comfortable with the basis upon which Lodi's fee structure rests.

It may also be appropriate to examine a secondary point here. The Nolte and McDonald studies established a method for spreading the cost of public facilities equitably over all new development in the City. Those who have already paid into the specific accounts under the most recent ordinances may have grounds to object if the assumptions on which the study and the fees are based is now arbitrarily changed, resulting in more of the burden being spread over fewer projects. Objections might be justified to waivers or exemptions based solely on the financial hardship of the applicant instead of the criteria found in §15.64.120 (A).

5. SIDEWALK REPAIR OBLIGATION

Attached hereto as Exhibit A is Resolution 85-93, adopted July 25, 1985 which establishes the City's policy on sidewalk repairs, this is specifically authorized by Streets & Highways Code §5610 et. seq. Other than in cases of damage caused by City maintained trees, grade subsidence, City utility cuts and heat expansion, the obligation to repair sidewalks is placed on the adjacent property owner.

Since I am not familiar with the underlying facts or circumstances in this

specific matter, I cannot say if the situation falls within one of the categories described.

6. PAYMENT SCHEDULE

A question was also presented as to the possibility of allowing applicants to pay fees in installments, instead of requiring full payment up front. The relevant provisions on this are found in Municipal Code §15.64.040 (C) which says:

> The fees shall be paid before the approval of a final subdivision map, building permit or grading permit, whichever occurs first except as provided in subsection (E) of this section [emphasis added].

Subsection (E) does not apply because no "public improvements" are required before this project can be built.

The troublesome language in this statute is the phrasing which says the fees "shall" be paid prior to a building permit. The word "shall" is generally viewed as mandatory (58 Cal. Jur. 3d, Statutes, §147) and that is the interpretation applied heretofore by Lodi in issuing permits to the best of my knowledge. This opinion is supported by the further wording in this statute which clearly says that the only exception to paying for fees before a building permit is found in subparagraph (E) which does not apply here.

While the Council has the power to change this Ordinance to make provisions for installment payments, the present language does not appear to allow it. As such, I believe it advisable to change the wording of the statute if it is the Council's desire to allow installment payment of fees. A contrary interpretation would require that all persons in similar situations be treated the same and it seems likely that many people would like to defer permit fees.

The Public Works Department, Community Development Department and City Manager might wish to offer input on this to the Council before a final determination is made on whether to allow installment payments for development fees. This possibility has been discussed previously by the Council.

BOB McNATT
City Attorney

BM:pn

KAMPE.1/TXTA.01V

EXHIBIT

H-1

RESOLUTION No. 85-93

RESOLUTION ESTABLISHING A CURB, GUTTER, AND SIDEWALK REPAIR POLICY FOR THE CITY OF LODI

RESOLVED, that the City Council of the City of Lodi does hereby establish a Curb, Gutter, and Sidewalk Repair Policy for the City of Lodi as shown on Exhibit "A", attached hereto and thereby made a part hereof.

Dated: July 24, 1985

I hereby certify that Resolution No. 85-93 was adopted by the City Council of the City of Lodi in an Adjourned Regular Meeting held July 24, 1985 by the following vote:

AYES: Council Members - Olson, Snider, and Hinchman (Mayor)

NOES: Council Members - Pinkerton and Reid

ABSENT: Council Members - None

ATTEST:

Alice M Reimche

ALICE M. REIMCHE
City Clerk

CURB, GUTTER & SIDEWALK REPAIR POLICY

Property owners or tenants have the responsibility to report to the City of Lodi all defective sidewalk fronting their property.

I. SIDEWALK REPAIR

A. TEMPORARY PATCHING - The City shall patch sidewalk where there is 3/4" - 1 1/2" vertical offset or minor irregularities. This will be done at no charge to the property owner. The property owner or tenant has the responsibility to notify the City of any change in the condition of the sidewalk or the patched area.

B. SIDEWALK REPLACEMENT - Sidewalks shall be removed and replaced when vertical offset is greater than 1 1/2."

1. Sidewalk and driveway apron replacement will be done by City under the following conditions:

   a. Damage caused by City-maintained trees
   b. Damage due to grade subsidence
   c. Damage due to City utility cuts
   d. Damage due to heat expansion
   e. Sidewalk fronting City-owned property

2. Property owner shall replace sidewalk and driveway apron where the hazardous condition is caused by something other than the above categories. The property owner shall have a licensed contractor do the work within a prescribed time. If, after formal notice by the City, the repairs are not completed within that time, the City shall make the repairs and assess the property owner.

II. CURB AND GUTTER REPAIR

A. The City shall repair and maintain all curb and gutter.

III. TREE MAINTENANCE

A. The City shall do root surgery on all City-maintained trees where it is required. City shall remove City-maintained trees when required under City's adopted Tree Policy. This work will be done in conjunction with the replacement of the sidewalk and/or the curb and gutter.

B. The City shall not do root surgery on any privately-owned trees.

Resolution 85-93 adopted by the City Council at its meeting of July 24, 1985